APPENDIX A.

Constitution and Treaty Provisions Cited and Quoted.

UNITED STATES CONSTITUTION, Article III, Section 1 and 2:

> "Section 1. Judicial Powers Vested in Federal Courts . . . The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> "Section 2. Jurisdiction of United States Courts . . . The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . ."

UNITED STATES CONSTITUTION, Article VI, Section 2:

> "This Constitution, and the Laws of the United States Which Shall Be Made in Pursuance Thereof; and All Treaties Made, or Which Shall be Made, Under the Authority of the United States, Shall Be the Supreme Law of the Land; and the Judges in Every State Shall Be Bound Thereby, *Anything in the Constitution or Laws of Any State to the Contrary Notwithstanding.*"

TREATY OF GUADALUPE HIDALGO, Article VIII, 9 Stats. at L. 922.

> "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, . . . *retaining the property which they possess* in the said territories, or disposing thereof and removing the proceeds where ever they please without their being subjected on this account to any contribution, tax, or charge whatever."

APPENDIX B.

Order for Summary Judgment, State Court of First Instance. Opinion of State Court of Intermediate Appeals. Deed in Controversy from Decedent Dated December 3, 1860.

Superior Court of the State of California, for the County of Orange.

Lyman W. Ames, et al, Plaintiffs vs. The Irvine Company, a corporation, et al, Defendants. No. 124432.

Order Granting Motion of Defendant for Summary Judgment.

The motion of defendant, The Irvine Company, for an order for Summary Judgment and the motions of plaintiffs as administrators of the Estate of Teodocio Yorba, Deceased, for an order for Summary Judgment and for an order for Judgment upon the Pleadings, came regularly on for hearing before me on July 24, 1964, and was submitted to the court on October 16, 1964; Manuel Ruiz and Alexander Ruiz appearing as attorneys for plaintiffs; and James G. Scarborough, and J. Gregg Evans and William L. Anderson, by William L. Anderson, appearing as attorneys for defendant, The Irvine Company; and the Court being fully advised in the premises and good cause appearing;

It Is Hereby Ordered that the Motion of defendant, The Irvine Company, be and the same is hereby granted; that judgment for the said defendant be rendered and entered herein declaring that plaintiffs as administrators of the Estate of Teodocio Yorba, Deceased, and all persons claiming under them and

through said estate have no right, title or interest in or to the lands described in the Patent from the United States of America to Teodocio Yorba referred to in the complaint on file herein.

It Is Further Ordered that the motion of plaintiffs for judgment on the pleadings and for summary judgment be and the same hereby are denied.

Done in Open Court: November 25, 1964.

Stephen K. Tamura
Judge of the Superior Court

Opinion of the State Court of Intermediate Appeals.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Lyman W. Ames and Mildred Yorba Serrano, Administrators of the Estate of Teodocio Yorba, Deceased, Plaintiffs and Appellants, v. The Irvine Company, a corporation, et al., Defendants and Respondents. 4th Civ. No. 8048.

Filed Dec. 5, 1966.

Appeal from a judgment of the Superior Court of Orange County. Stephen K. Tamura, Judge. Affirmed.

Ruiz & Ruiz, Manuel Ruiz, Jr. and Alexander Ruiz, for Plaintiffs and Appellants.

Wm. L. Anderson, J. Gregg Evans and James G. Scarborough, for Defendant and Respondent, The Irvine Company.

Plaintiffs, as administrators of the Estate of Teodocio Yorba, deceased, filed this action to obtain

a judgment declaring the estate and heirs of Yorba to be the owners of a 7/11ths interest in a tract of land defendant claims entirely. Judgment decreeing the estate and heirs of Yorba had no interest in the land followed an order granting defendant's motion for summary judgment, and a further order denying plaintiffs' motion for judgment on the pleadings or, in the alternative, for summary judgment. Plaintiffs appealed; contend the court erred in granting defendant's motion, because the facts do not support the judgment, and also erred in denying their motion. We have concluded the orders in question were proper, and the judgment should be affirmed.

The tract in question consists of approximately 10.7 square leagues of land described in a patent issued by the United States of America on February 1, 1868, pursuant to the Act of Congress of March 3, 1851 (Stat. 631, c. 41), providing for the settlement of Mexican land grant claims.

This patent followed confirmation, in the manner prescribed by the Act of Congress, of the claim of Yorba under a Mexican land grant dated May 26, 1846. In that grant the land was described as follows:

> "The Range of hills situated upon the slope of the Sierra Known by the name of the 'Santiago', being bounded by the same upon the East, by the Serrito de los Ranas and the boundary of San Joaquin upon the West, and by the 'Rancho del Toro' upon the South."

Under the law of Mexico controlling such grants, the maximum six thereof was limited to 11 square leagues. (*United States v. Hartnell's Heirs,* 63 U.S. 340 [22 How. 286; 16 L. Ed. 340].)

The Act of Congress provided that proceedings might be instituted to confirm a claim to land under a Mexican grant, and further provided that unless a petition to confirm such a claim was filed within two years after adoption of the Act the land subject thereto would be considered a part of the public domain of the United States. (*Botiller v. Dominguez,* 130 U.S. 238 [9 S. Ct. 525, 527; 32 L. Ed. 926]; *More v. Steinbach,* 127 U.S. 70 [8 S. Ct. 1067; 32 L. Ed. 51].)

On October 26, 1852, Yorba filed a petition with the United States Board of Land Commissioners to confirm his title to the land claimed under the aforesaid grant; referred to it as "a tract of land called Lomas de Santiago containing *four square leagues* more or less, situated in the County of Los Angeles"; (Italics ours) and described its boundaries in the same manner as in the grant. The Board of Land Commissioners confirmed Yorba's title and, on December 11, 1856, its order was affirmed by the District Court of the United States for the Southern District of California by decision which stated, in part, ". . . that the claim of the appellee (Yorba) is good and valid and that the same be and hereby is confirmed to him to the extent of Eleven Square Leagues & no more within the boundaries specified in the grant or 'Titulo' filed in this case reference being had to the Expediente and Map referred to in Said Grant and to the act of Judicial Possession filed in this case: Provided that if there be less than the quantity of Eleven Square Leagues of

land contained and included within the boundaries mentioned, then Confirmation is hereby made of Such less quantity."[1]

On December 3, 1860, Yorba and his wife executed a deed which is the source of the controversy at hand. This deed conveyed to a man named Wolfskill a tract of land described as follows:

> "All That certain tract of land situated in the City and County of Los Angeles and State of California Known as the Rancho of Santiago, containing Four Leagues be the same more or less and bounded on the North by the Santa Ana River, East by the mountains South by the Rancho of Aliso and West by the Rancho of San Joaquin, reference being made to the original grant and to the decrees of confirmation in the United States District Court, for a more particular description, the quantity given by the United States Court to be the quantity conveyed by this instrument. . . ."

Previously Yorba had executed mortgages upon a tract of land referred to as Rancho of Santiago, containing six leagues of land, more or less; these mort-

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[1]Under the Mexican law applicable to land grants the petitioner for a grant was required to accompany his application with a map of the land in question (called a diseno); the record of the proceedings was called the "espediente" which consisted of (1) the application, (2) the map, (3) an order referring the matter to local authorities for confirmation, (4) a report by the local authorities, (5) the grant or "titulo" by the Governor, and (6) the approval by the departmental assembly; and following these proceedings a delivery of possession of the land described in the grant by a magistrate was essential to its validity; the latter ceremony was called the "act or delivery of juridical possession"; and a record of this proceeding was kept by the magistrate and a copy given the grantee. (Gen. see *United States v. Bolton*, 23 How. 341 [64 U.S. 569, 572; 16 L. Ed. 569].)

gages also contained a description by reference to the location of other ranches or natural monuments. The latest of these was executed on October 22, 1859 in favor of Wolfskill to secure the payment of $7000. The recorded copy of this mortgage contained a marginal satisfaction dated Dec. 4, 1860.

Following confirmation of the grant, and preceding issuance of the patent, as provided by law a survey and map of the tract of land included within the decree of confirmation were made through the office of the United States Surveyor General.

The patent, dated February 1, 1868, recites the proceedings in the premises from issuance of the Mexican grant to the filing of the aforesaid survey and map in the office of the Surveyor General; refers to the property in question as a tract of land "called Lomas de Santiago"; incorporates the map which is attached to the certificate of the Surveyor General certifying Yorba was entitled to a patent for the land; and describes the land by metes and bounds.[2] As described and shown on the map the tract in question contains 47,226.61 acres of land or approximately 10.7 square leagues.

Plaintiffs contend the deed from Yorba to Wolfskill conveyed a tract of land known as "Rancho of Santiago" containing four square leagues; this tract of land was part of a larger tract known as "Lomas de Santiago" containing eleven square leagues; the conveyance to Wolfkill did not identify the boundaries of "Rancho of Santiago" with certainty; as a consequence,

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[2]The description of the land claimed and confirmed as contained in the patent is conclusive. (*Deguyer v. Banning,* 167 U.S. 723 [17 S. Ct. 937, 941].)

under settled law,[3] Wolfskill received an undivided 4/11ths interest in the tract known as "Lomas de Santiago"; and Yorba retained an undivided 7/11ths interest in that tract.

The defendant contends, as the trial court concluded, that the conveyance to Wolfskill on its face shows it was the intention of the parties to transfer all of the land received by Yorba under the Mexican grant and confirmed by decree of the United States District Court.

The construction of a deed, on its face, including the description therein, involves a question of law. (*Mulford v. LeFranc,* 26 Cal. 88, 111-112; *Victory Oil Co. v. Hancock Oil Co.,* 125 Cal. App. 2d 222, 233.) The intention of the parties as expressed in the deed controls. (*Burnett v. Piercy,* 149 Cal. 178, 189; *Faivre v. Daley,* 93 Cal. 664, 670-671; *Mulford v. LeFranc, supra,* 26 Cal. 88, 111; *Basin Oil Co. v. City of Inglewood,* 125 Cal. App. 2d 661, 663; *Wilkerson v. Thomas,* 121 Cal. App. 2d 479, 484.) In determining this intention the whole instrument should be considered. (*Slavich v. Hamilton,* 201 Cal. 299, 304; *Coon v. Sonoma Magnesite Co.,* 182 Cal. 597, 600; *Burnett v. Piercy, supra,* 149 Cal. 178, 189; *Faivre v. Daley, supra,* 93 Cal. 664, 670; *Pio Pico v. Coleman,* 47 Cal. 65, 67; *Basin Oil Co. v. City of Inglewood, supra,* 125 Cal. App. 2d 661, 663; *Wilkerson v. Thomas,*

[3]The rules of law upon which plaintiffs rely is stated in *Augustus Schenk v. John Evoy,* 24 Cal. 104, 110, as follows: "Where a deed is of a given quantity of land, parcel of a larger tract, and the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivering of the deed, becomes interested in all the land embraced within the larger area, as tenant in common with his grantor." (In accord: *Grogan v. Vache,* 45 Cal. 610, 613; *Lawrence v. Ballou,* 37 Cal. 518, 520.)

supra, 121 Cal. App. 2d 479, 484.) Reference in a deed to other documents or maps incorporates the latter therein with the same effect as though copied into the instrument. (*Vance v. Fore,* 24 Cal. 435, 444; *City of Oakland v. Adams,* 37 Cal. App. 614, 616; see also *Faivre v. Daley, supra,* 93 Cal. 664, 671.) Clauses or words repugnant to the intention of the parties as disclosed in the deed should be rejected. (*Coon v. Sonoma Magnesite Co., supra,* 182 Cal. 597, 600; *Basin Oil Co. v. City of Inglewood, supra,* 125 Cal. App. 2d 661, 663; see also *Burnett v. Piercy, supra,* 149 Cal. 178, 189-190; *Faivre v. Daley, supra,* 93 Cal. 664, 671; *Wilcoxson v. Sprague,* 51 Cal. 640, 642; cf. *Select Base Materials v. Board of Equal.,* 51 Cal. 2d 640, 645; *Harris v. Klure,* 205 Cal. App. 2d 574, 577.) A statement of the quantity of land conveyed is the least certain part of the description and yields to a statement of boundaries. (*Gragg v. Culp,* 198 Cal. 579, 585; *Stanley v. Green,* 12 Cal. 148, 162-163.)

The intention of the parties to the instant deed was to transfer to Wolfskill all of the property obtained by Yorba under the Mexican grant to which title had been confirmed by the United States District Court. Reference in the deed to "the Rancho of Santiago, containing Four Leagues be the same more or less" loses significance in determining the intention of the parties upon consideration of the further reference to the tract as "bounded on the North by the Santa Ana River, East by the mountains South by the Rancho of Aliso and West by the Rancho of San Joaquin, reference being made to the original grant and to the decrees of confirmation in the United States District Court, for a more particular description, the quantity

given by the United States Court to be the quantity conveyed by this instrument." All of the foregoing references are part of the granting clause. Noteworthy, also, is the fact that in his petition for confirmation Yorba referred to the property claimed by him as a tract of land "containing four square leagues," by virtue of which he obtained a confirmation of his claim to that tract of land "to the extent of Eleven Square Leagues," and a patent to that tract of land using a description thereof encompassing 10.7 square leagues. It is significant that grantors specifically stated that the quantity of land "given" by the United States Court was the quantity of land conveyed by the deed The term "given", contrary to plaintiffs' contention, is used to denote the action of the court in confirming the claim of Yorba "to the extent of Eleven Square Leagues & no more within the boundaries specified in the grant . . . Provided That if there be less than the quantity of Eleven Square Leagues of land contained and included within the boundaries mentioned, then Confirmation is hereby made of Such less quantity." The only land with which this action is concerned is that included within the decree of confirmation; is the land particularly described in the patent; and is that in which plaintiffs, for the estate of Yorba and his heirs, claim an undivided 7/11ths interest. The language of the deed does not support the conclusion it refers to a tract of land known as the Rancho of Santiago, containing Four Square Leagues, which is included within a larger tract having boundaries as therein stated. Instead the language distinctly refers to a tract of land known as the "rancho of Santiago, containing Four Leagues . . . *and* bounded on the North by the Santa Ana River, East by the mountains South by the Rancho

of Aliso and West by the Rancho of San Joaquin. . . ." (Italics ours.). The map incorporated in the patent, under which all parties claim, portrays the tract of land covered by the patent to be an irregularly shaped, seven-sided parcel the northerly portion of which is triangular, with the northerly tip of the triangle intersected by the Santa Ana River which constitutes the northerly boundary of the property. Thus that part of the description of the tract of land as bounded "on the North by the Santa Ana River," which is contained in the deed, coincides with the description of the northerly boundary as ultimately determined and set forth in the patent. The easterly, southerly and westerly boundaries stated in the deed are, respectively, "the mountains," "the Rancho of Aliso," and "the Rancho of San Joaquin." The plat incorporated in the patent notes a range of mountains on the east of the subject property, the "Rancho Cañada de Los Alisos" to the southwest, and the "Rancho San Joaquin" to the south and west. The quantity of land encompassed within the boundaries of the deed, viz, the Santa Ana River, the mountains on the east, the Rancho of Aliso and the Rancho San Joaquin, equates that confirmed by the District Court's decree. The additional statement in that part of the deed describing the tract of land conveyed which refers "to the original grant and decree of confirmation in the United States District Court for a more particular description," further corroborates the conclusion that the property described was that received under the original grant and confirmed by the court decree which was a tract of land determined to contain approximately 10.7 square leagues. The reference to the "original grant" and the "decree of confirmation" for a more

particular description qualifies the reference to the property as the "Rancho of Santiago containing Four Leagues." (See *Anaheim Sugar Co. v. County of Orange,* 181 Cal. 212, 222.)

The plaintiffs, by a process of segmentation, confine the description in the deed to a "tract of land known as the Rancho of Santiago containing Four Leagues." In this manner they claim the statement in the deed that "the quantity given by the United States Court to be the quantity conveyed by this instrument" should be disregarded as a part of the *habendum* clause in conflict with the grant; in the quoted statement the term "given" has no meaning because the court did not give any property; there is no northerly boundary described in the original grant; in executing mortgages referring to a tract known as the "Rancho of Santiago" Yorba identified a tract smaller in area than that included within the tract known as "Lomas de Santiago," which was a designation used in his petition for confirmation and in the patent; the mortgage from Yorba to Wolfskill in 1859, satisfaction of which was entered on December 4, 1860, should be considered in construing the deed under the contemporaneous writing rule; reference in the deed to the "original grant" is not of assistance because the description therein by natural boundaries covered over 100 square leagues and, in fact, only two boundaries are there described; the reference in the deed to the original grant and the decree of confirmation "for a more particular description" is of no effect because the description referred to is fatally defective as incapable of fixing an area; and the reference to the prior proceedings is only as a source of title and not by way of description. None of these claims is valid.

The intention of the parties must be obtained from a consideration of the deed as a whole rather than the itemized manner adopted by plaintiffs. The statement that the quantity given by the United States Court was the quantity to be conveyed by the deed is a part of the granting clause rather than the *habendum*. In any event, the intention of the parties is gathered from the whole instrument. (*Basin Oil Co. v. City of Inglewood, supra,* 125 Cal. App. 2d 661, 662.) The use of the term "given" with reference to the action taken by the United States District Court has no significance in determining the intention of the parties. Of like import are the arguments that there is no northerly boundary described in the original grant, the description therein covered over 100 leagues, or that Yorba executed mortgages on a tract of land he referred to as Rancho of Santiago. Even considering the 1859 mortgage as a contemporaneous writing, the description therein, in light of the description in the deed, did not indicate an intention by the parties to convey less than the amount of land Yorba had received under the original grant as confirmed by the decree of the United States District Court. Whether any particular description incorporated in the deed by reference to other documents was complete in itself is of no consequence. The references in question dictate the conclusion the parties intended the deed to convey all of the property Yorba received under his grant as confirmed by the court's decree. Other claims by the plaintiffs are similar in import to those heretofore noted and need not be given specific consideration because none of them dictates a contrary conclusion respecting the intention of the parties.

Procedural objections advanced by plaintiffs at oral argument as grounds for reversal have no merit. The affidavits upon which the motions for summary judgment were submitted do not present any triable issue of fact. The intention of the parties to the subject deed is ascertainable from the language used as related to undisputed facts. The issue thus presented is one of law. (*Western Coal & Mining Co. v. Jones,* 27 Cal. 2d 819, 826.) Under these circumstances a summary judgment is proper. (*Loma Portal Civic Club v. American Airlines, Inc.,* 61 Cal. 2d 582, 588; *People ex rel. Mosk v. City of Santa Barbara,* 192 Cal. App. 2d 342, 349; *Tibbs v. Smart & Final Iris Co.,* 152 Cal. App. 2d 618, 623.)

The judgment is affirmed.

Coughlin, *J.*

We concur:

Brown, Gerald, *P. J.*

Whelan, *J.*

Deed in Controversy.

PLAINTIFFS' EXHIBIT A.

[In margin]: T. Yorba et ux. to Wm. Wolfskill.

This Indenture made the Third day of December in the year of our Lord one thousand eight hundred and sixty, between Teodocio Yorba and Inocencia Reyes de Yorba, wife, parties of the first part, and William Wolfskill party of the second part. Witnesseth that the said parties of the first part for and in consideration of the sum of Seven Thousand Dollars lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted bargained sold aliened remised released conveyed and confirmed, and by these presents, Do grant, bargain sell alien remise release convey and confirm unto the said party of the second part and to his heirs and assigns forever. All That certain tract of land situated in the City and County of Los Angeles and State of California Known as the Rancho of Santiago containing Four Leagues be the same more or less and bounded on the north by the Santa Ana River, East by the mountains, South by the Rancho of Aliso and West by the Rancho of San Joaquin, reference being made to the original grant and the decree of confirmation in the United States District Court, for a more particular description, the quantity given by the United States Court to be the quantity conveyed by this instrument. Together with all and singular the tene-

ments, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate right title interest, property, possession, claim and demand whatsoever, as well in law or in equity of the said part of the first part of in or to the above described premises, and every part and parcel thereof with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever. And the said Teodocio Yorba gives the said possession in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part, their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will Warrant and by these presents forever defend. In Witness Whereof. The said parties of the first part have hereunto set hands and seals the day and year first above written.

Teodocio his X mark Yorba (Seal)

Inocencia Reyes his X mark de Yorba (Seal)

Signed sealed and delivered
in presence of
Agustin Olvera. K. H. Dimmick

State of California, County of Los Angeles. S.S. On this third day of December A.D. One Thousand Eight hundred and sixty before me Kimbal H. Dimmick, a Notary Public in and for said County personally appeared Teodocio Yorba and Inocencia Reyes de Yorba his wife, personally known to me to be the individuals described in and who executed the annexed Instrument as parties thereto and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said Inocencia Reyes de Yorba wife of the said Teodocio Yorba having been by me first made acquainted with the contents of said Instrument, acknowledged to me on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily without fear or complusion, or undue influence of her husband, and she did not wish to retract the execution of the same.

In Witness Whereof. I have hereunto set my hand and affixed my official Seal the day and year in this Certificate first above written. (Notarial Seal)

K. H. Dimmick
Notary Public

A full, true and correct copy of the original recorded this 4th day of December, A.D. 1860, at 3 hrs. 20 ms. P.M. at request of Wm. Wolfskill.

John W. Shore Co. Recorder.
by O. Morgan Depty.

APPENDIX C.

Conflicting Federal Opinion.

Case No. 15,121, United States v. Flint et al., 4 Sawy. 42, Circuit Court D. California September 4, 1876.

25 Fed. Cas. page 1108

Before Field, Circuit Justice, Sawyer, Circuit Judge, and Hoffman, District Judge.

Field, Circuit Justice. The case of U.S. v. Flint is a suit in equity, the main object of which is to set aside and annul the decree of the district court of the Southern district of California, confirming the claim of Teodocio Yorba to the rancho Lomas de Santiago, situated in the county of Los Angeles, in this state, and to recall and cancel the patent issued thereon by the United States. It is brought by the district attorney for California, and purports to be on behalf of the United States. It appears, from the allegations of the bill, and the record to which the bill refers, that in October, 1852, the claimant, who has since deceased, presented to the board of land commissioners, created under the act of congress of March 3, 1851, to ascertain and settle private land claims in California, a petition setting forth his claim to the rancho in question, and stating that the same was granted to him in May, 1846, by the governor of the department; that the grant had been approved by the departmental assembly; that juridical possession of the land had been delivered to him by competent authority, and its boundaries defined; and that he was then and had been previously in its peaceable occupation.

With the petition, and as part thereof, the claimant presented copies of the grant and act of juridical

possession, accompanied by a translation of the same, and prayed that the grant be adjudged valid and confirmed to him. The board of commissioners considered the claim thus presented, and took the depositions of several witnesses in support of it, and, in August, 1854, rendered a decree adjudging it to be valid, and directing its confirmation. In November, 1855, a petition was filed on behalf of the United States, in the district court for the Southern district of California, for a review of the decision, alleging that the claim confirmed was invalid, and the decision of the commissioners erroneous; that the allegations of the complainant in his petition were unsupported by sufficient proof; and denying that he had any right or title to the land confirmed, or to any part of it. The claimant answered this petition, joining issue upon its allegations, and the court took jurisdiction of the case, heard it anew, and, in December, 1856, rendered its decree, affirming the decision of the commissioners, and readjudged the claim to be valid. An appeal from this decree to the supreme court of the United States was allowed, but the attorney general, after some months' deliberation, gave notice that the appeal would not be prosecuted; and thereupon the district court, upon the consent of the district attorney, vacated the order allowing the appeal, and gave the claimant leave to proceed upon its decree as a final decree in the case. A survey of the land was subsequently made under the direction of the surveyor general of the United States for California, and approved by that officer; and in February, 1868, a patent was issued to the claimant.

It thus appears that, after a contest for nearly sixteen years before officers and tribunals of the United States, the claimant obtained a patent from the government, an instrument designed to give to its holder security and protection in the enjoyment of the property covered by its terms. All the defendants acquired their interests in the land after the decree of confirmation, and two of them after the patent was issued. Nineteen years after the final decree was thus rendered and eight years after the patent was issued, the present bill was filed. And as grounds for setting aside and annulling the decree, and recalling and canceling the patent, the district attorney alleges upon information and belief: 1. That the grant and act of juridical possession were made subsequently to the acquisition of the country in 1846, and were fraudulently antedated, and that this appears on the face of the original papers on file in the Spanish archives in the custody of the surveyor-general of the United States; that the claimant fraudulently omitted to exhibit a complete record of the proceedings, and only presented extracts from them; and by this suppression the law agent of the United States was misled, the United States deprived of all opportunity to contest the confirmation, and the land commission and court were deceived into a confirmation of the claim; and, 2. That previous to the issue of the alleged grant, and as early as 1840, the claimant had obtained from the Mexican nation a grant of eleven leagues, situated in the counties of Sacramento, San Joaquin and Amador, which was subsequently confirmed by the supreme court of the United States; that by the laws of Mexico, a grant for more than eleven leagues could not be made to the same

person, and that the claimant was therefore disqualified from receiving any other grant, and that the existence of this prior grant was fraudulently concealed from the law agent of the United States, the land commission, and the district court.

25 Fed. Cas. page 1109

The district attorney also alleges in the bill, upon information and belief, that the approved survey is not in conformity with the boundaries given in the diseno, or map accompanying the grant and the act of juridical possession, but embraces a much greater quantity, and was made upon the fraudulent instigation and procurement of three of the defendants. The district attorney therefore prays that, in case he fail to obtain the annulment of the decree, and the recall and cancellation of the patent, the boundaries of the tract confirmed may be re-established and fixed in accordance with the views stated by him as to the location intended by the grant and act of juridical possession.

The first inquiry, which naturally arises upon the perusal of this bill, is as to what jurisdiction this court has to interfere with and review the determinations of the land commission and district court upon the validity of claims to land derived from Mexican or Spanish authorities, and of the land department in approving the surveys of the claims confirmed. The questions submitted to the commission and the district court were not within the ordinary cognizance of a court of law or a court of equity. They related to the obligations devolving upon our government from the concessions of the former government to its inhabitants. How far these concessions should be respected, and how far enforced, were the matters to be considered; and in their

determination the tribunals were to be governed by the stipulations of the treaty, the law of nations, the laws, usage and customs of the former government, the principles of equity, and the decisions of the supreme court, so far as they were applicable.

By the transfer of California from Mexico to the United States, the rights of private property of the inhabitants were not affected. They remained as under the former government. The public property of Mexico and sovereignty over the country alone passed to the United States. This was in accordance with the rule of public law, which is recognized by all civilized nations when territory is ceded by one state to another. The obligation, therefore, to protect private rights of property devolved upon the United States, without any formal declaration to that effect. But, in recognition of this obligation, Mexico obtained from the United States, in the treaty of cession, an express stipulation for such protection. And the term property, as applied to lands, and as used in the treaty, comprehends every species of title, perfect or imperfect. "It embraces," says Chief Justice Marshall, "those rights which are executory as well as those which are executed." The United States, therefore, took California bound by the established principles of public law, and by express stipulation of the treaty, to protect all private rights of property of the inhabitants. The obligation rested for its fulfillment in the good faith of the government, and required legislative action. It could, therefore, only be discharged in such manner and at such times and upon such conditions as congress might, in its discretion, direct. In its discharge, such action was required as would enable the inhabitants to assert and maintain their rights

to the property in the courts of the country as fully and absolutely as though their titles were derived directly from the United States. Where the titles were imperfect (and such was the condition of nearly all the titles held in the country), further action, by way of confirmation or release from the new government, was essential. With respect to all such titles, and, indeed, with respect to all matters dependent upon executory engagements of the government, the ordinary courts of the United States, whether of law or equity, were entirely powerless. They were without jurisdiction, and utterly incompetent to deal with them.

By the act of March 3, 1851, the legislative department prescribed the mode in which the provisions of the treaty should be carried out, and the obligations of the government to the former inhabitants discharged, so far as their rights respected the territory acquired; and thus provided the means of separating their property from the public domain. That act created a commission of three persons, to be appointed by the president, by and with the advice and consent of the senate, for the express purpose of ascertaining and settling private land claims in the state. It gave a secretary to the commission, skilled in the Spanish and English languages, to act as interpreter and to keep a record of its proceedings. It provided an agent, learned in the law and skilled in those languages, to superintend the interests of the United States, and it was made his duty to attend the meetings of the commissioners, to collect testimony on behalf of the United States, and to be present on all occasions when the claimant, in any case, took depositions. To the commission, every person claiming lands in California, by virtue of any right or

title derived from the Spanish or Mexican governments, was required, on pain of forfeiting his land, to present his claim, together with the documentary evidence and testimony upon which he relied in its support. The commissioners, while sitting as a board, and at their chambers, were authorized to administer oaths and take depositions in any case pending before them. The testimony was to be reduced to writing and recorded in books provided for the purpose. The commissioners were obliged to hear every case, and decide upon the validity of the claim, and within thirty days after their decision, to certify the same, with the reasons on which it was founded, to the district attorney of the district. The act provided also for a review of the decision of the commissioners, upon petition of the

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claimant or the district attorney, setting forth the grounds upon which the validity or invalidity of the claim was asserted. To the petition an answer was required from the contestant, whether claimant or the United States. Subsequently, in August, 1852, the act was changed in this particular, and, when a decision was rendered by the commissioners, they were required to prepare two certified transcripts of their proceedings and decisions, and of the papers and evidence upon which the same were founded, one of which was to be transmitted to the attorney-general, and the other filed with the clerk of the district court, and this filing operated as an appeal on behalf of the party against whom the decision was rendered. In case the decision was against the United States, the attorney-general, within six months after receiving the transcript, was required to cause a notice to be filed with the clerk

that the appeal would be prosecuted, or it was to be regarded as dismissed.

Upon the review by the district court upon the petition or appeal, not merely the evidence before the commissioners was considered, but further evidence could be taken by either the claimant or the government; so that, in fact, the whole matter was heard anew, as upon an original proceeding. From its decision, an appeal lay to the supreme court of the United States.

As thus seen, the most ample powers were vested in the commissioners and the district court to inquire into the merits of every claim; and they were not restricted in their deliberations by any narrow rules of procedure or technical rules of evidence, but could take into consideration the principles of public law and of equity in their broadest sense. When the claim was finally confirmed, the act provided for its survey and location, and the issue of a patent to the claimant. The decrees and the patents were intended to be final and conclusive of the rights of the parties, as between them and the United States. The act, in declaring that they should only be conclusive between the United States and the claimants, did, in fact, declare that as between them they should have that character.

Here, then, we have a special tribunal, established for the express purpose of ascertaining and passing upon private claims to land derived from Spanish or Mexican authorities, clothed with ample powers to investigate the subject and determine the validity of every claim, and the propriety of its recognition by the government, capable in any court could possibly be made of detecting frauds connected with the claim, and whose first inquiry in every case was necessarily as to the authenticity

and genuineness of the documents upon which the claim was founded.

We have a special jurisdiction of a like nature in the district court to review the decision made by the commissioner, and investigate anew the claim. We have principles prescribed for the government of both commission and court in these cases, and of the supreme court, upon appeal from their decisions, not applicable in ordinary proceedings, either at law or in equity, and as already stated, every person claiming land in the state was required to present his claim for investigation. The onerous duty thus thrown upon him was relieved of its oppressive character by the accompanying assurance, that when his claim was adjudged valid, the adjudication should be final and conclusive.

On principle, such adjudications cannot be reviewed or defeated by a court of equity, upon any suggestion that the commissioners and court misapprehended the law, or were mistaken as to the evidence before them, even if that consisted of fabricated papers supported by perjured testimony. The very questions presented by the present bill were necessarily involved in the proceeding before the commissioners and the district court, and the credibility of the testimony offered was a matter considered by them. Whether the grant produced by the claimant was genuine, and the claim resting thereon was entitled to confirmation, were the points at issue. The bill avers that the alleged grant was not genuine because it was ante-dated. But the genuineness of the document was the matter sub judice, and could not have been established, and the claim based upon it affirmed, except by evidence satisfactory to the commission and court, that it was made at the time stated.

It is to no purpose in such case to invoke the doctrine that fraud vitiates all transactions, even the most solemn, and that a court of equity will set aside or enjoin the enforcement of the most formal judgments when obtained by fraud. The doctrine of equity in this respect is not questioned; it is a doctrine of the highest value in the administration of justice, and its assertion in proper cases is essential to any remedial system adequate to the necessities of society. But it cannot be invoked to reopen a case in which the same matter has been once tried, or so put in issue between the parties that it might have been tried. The judgment rendered in such a case is itself the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. It is afterwards mere assumption to say that the fraud was perpetrated. The judgment has settled the matter otherwise; it is res judicata.

The frauds for which courts of equity will interfere to set aside or stay the enforcement of a judgment of a court having jurisdiction of the subject-matter and the parties, must consist of extrinsic collateral acts not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed upon.

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All litigants are equally entitled to justice from the tribunals of the country; they can claim equal opportunities of producing their testimony and presenting their case, and they can equally have the advocacy of counsel. Whenever one party by any contrivance presents his adversary from having this equality with him

before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered. Thus, if, through his instrumentality, the witnesses of his adversary be forcibly detained from the court, or bribed to disobey its subpoena, or the testimony of his adversary be secreted or purloined, or if the citation to him be given under such circumstances as to defeat its purpose, a fraud is committed, for which relief will be granted by a court of equity, if it produce injury to the innocent party. Any conduct of the kind mentioned would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if the litigation be collusive; if the parties be fictitious; if real parties affected are falsely stated to be before the court, the judgment recovered may be set aside or its enforcement restrained, for in all these cases there would be the want of the actual litigation which is essential to a valid judicial determination. To every such case the words of the jurist would be applcable: "Fabula, non judicium, hoc est; in scena, non in foro, res agitur."

The credibility of testimony given in a case, bearing upon the issue, is not an extrinsic collateral act, but is a matter involved in the consideration of the merits; and the introduction of false testimony, known or shown to be so, does not affect the validity of the judgment rendered. In every litigated case where the interests involved are large, there is generally conflicting evidence. Witnesses, looking at the same transaction from different standpoints, give different accounts of it. The statements of some are unconsciously affected by their wishes, hopes, or prejudices. Some, from defective rec-

ollection, will blend what they themselves saw or heard with what they have received from the narration of others. Uncertainty as to the truth in a contested case will thus arise from the imperfection of human testimony. In addition to this source of uncertainty may be added the possibility of the perjury of witnesses, and the fabrication of documents. The cupidity of some and the corruption of others may lead to the use of these culpable means of gaining a cause. But every litigant enters upon the trial of a cause, knowing not merely the uncerainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter frauds of this character. He takes the chances of establishing his case by opposing testimony, and by subjecting his opponent's witnesses to the scrutiny of a searching cross-examination. The case is none the less tried on its merits, and the judgment rendered is none the less conclusive by reason of the false testimony produced. Thus, if an action be brought upon a promissory note, and issue be joined on its execution, and judgment go for the plaintiff, and there be no appeal, or if an appeal be taken, and the judgment be affirmed, the judgment is conclusive between the parties, although, in fact, the note may have been forged and the witnesses who proved its execution may have committed perjury in their testimony. The rules of evidence, the cross-examination of witnesses, and the fear of criminal prosecution with the production of counter testimony, constitute the only security afforded by law to litigants in such cases. A court of equity could not afterward interfere upon an allegation of the forgery and false testimony, for that would be to reopen the case to a trial upon the execution of the note, which had already been sub judice, and passed into judgment.

These views are in consonance with the adjudged cases. We have looked in vain through all those cited by the learned associate counsel in the Throckmorton Case for anything infringing upon them. In the Duchess of Kingston's Case [1 Leach, 146] the sentence of the spiritual court was held to be fraudulent and void, because obtained by collusion of the parties. And, in giving the opinion of the judges to the house of lords, Chief Justice De Grey observed that, although a judgment was conclusive evidence upon the point involved, and could not be impeached from within, yet, like all other acts of the highest judicial authority, could be impeached from without, and that fraud was an extrinsic collateral act which vitiated the most solemn proceedings of courts of justice.

In the Shedden Case, 1 Macq. 535, the question was whether a judgment of the court of sessions of Scotland against the legitimacy of the plaintiff, affirmed by the house of lords, could be attacked in another suit in the inferior court, and treated as a nullity for collusive suppression of proof which would have established his parents' marriage. The house of lords held that the judgment could be thus attacked, but that the allegations of fraud and collusion in the case were not sufficiently specific, pointed, and relevant to be admitted to proof. Opinions in the case were given by the chancellor and two of the law lords, Brougham and St. Leonards. The judgment of the house of lords, said Brougham, was to be "dealt with in the inferior court before which its merits were brought; that is to say, not the merits of the judgment, but the merits of the parties who had so fraudulently obtained it—the question being, was it a real judgment or not? For that is

the only question in such cases, and that is the question in this case."

In Fermor's Case, 3 Coke, 77, the tenant continued to pay rent to his landlord after he had levied a fine with proclamation to bar the inheritance, and thus kept
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the latter in ignorance of that proceeding. The tenant attempting, after the expiration of the lease, to hold the property on the ground that the right of the landlord was barred by the lapse of time allowed by statute to make an entry or bring his action after the fine, the court, upon a bill filed for relief, held that he was not barred, by reason of the deception practiced upon him. The payment of the rent was in fact a declaration by the tenant that his relation to the landlord had not changed, and operated as a fraud preventing the latter from asserting his rights.

Great stress is placed by the learned associate counsel upon these last two cases; but it is evident, from the statement we have made, that the fraud alleged in both cases was an extrinsic collateral act which prevented the complaining party, in the one instance from having the merits of his case considered, and in the other instance from taking proceedings or his protection. So in all the other cases, extrinsic collateral acts of fraud will be found to constitute the grounds upon which the court has acted. And on principle it must be so, for if the merits of a case could be a second time examined by a new suit, upon a suggestion of false testimony, documentary or oral, in the first case there would be no end to ligitation. The greater the interests involved in a suit, the severer generally the contention; and in the majority of such cases, the recovery of judgment would be the

occasion of a new suit to vacate it, or restrain its enforcement. If the present bill could be sustained upon the grounds alleged, and we should set aside the decree of the district court, a new bill might years hence be filed to annul our judgment and reinstate the original decree, on the same grounds urged in this case, that fabricated papers and false testimony had been used before us, which eluded the scrutiny of the counsel and escaped our detection. Of course, under such a system of procedure, the settlement of land titles in the state would be postponed indefinitely, and the industries and improvements, which require for their growth the assured possession of land, would be greatly paralyzed.

For the reasons stated, we are of opinion that there is no ground of fraud presented by the bill for the interference of a court of equity with the decree of confirmation rendered by the district court. It is upon that ground alone that the bill proceeds. It is not a bill of review for new matter, discovered since the decree. A bill of that character can only be filed by leave of the court; and that cannot be obtained without a showing that the new matter could not have been used in the original cause, and could not previously have been ascertained by reasonable diligence. It does not lie where the decree in the original cause was obtained by consent, or where objections to the decree rendered were subsequently withdrawn and consent was given to its execution. And it can only be allowed by a court possessing the power, upon a review of the case, to determine the rights of the parties to the property, or in the matter involved, or, at least, authorized to remit the case to a tribunal having adequate jurisdiction for that purpose. The present bill was not filed upon leave; and this court possesses

no power to determine the right of the claimant, upon any review of the case, to a confirmation of his claim, and the only tribunal to which such a determination could be remitted has long since ceased to exist.

But there are other, and equally potential grounds against the maintenance of the present suit. The land commission and the district court, though exercising a special jurisdiction, were invested with very large and extensive powers. They were not, as already stated bound in their decisions to any strict rules of technical law, but could be governed by the principles of equity in their widest scope. The result of their inquiries was to guide the government in the discharge of its treaty obligations. Considerations, therefore, which could not be presented to ordinary tribunals, might very properly be regarded by them.

After the determination of the commissioners, if against the United States, the control of the proceedings was placed with the attorney general. It rested with him exclusively to determine whether the appeal from the commissioners, taken by filing a copy of the transcript with the clerk of the district court, should be prosecuted or dismissed. So, also, when an appeal was taken from the decree of the district court, he could, in the same way, direct its prosecution or dismissal. Considerations of policy, as well as of strict right, might be deemed by him sufficient to control his action in this respect. In coming to a determination on the subject, he was not restricted to an examintion of the transcript transmitted to him; he could look into the archives of the former government, the reports of officers previously appointed to examine into the subject of the land titles of the state, the records of the land

department at Washington, and any correspondence existing between Mexico and the United States respecting the title. His power was unlimited, and the propriety or legality of his action in any case was not the subject of review by any tribunal whatever, and it could only be revoked by the appellate court upon his own application.

In the case of Yorba [unreported], the appeal from the decree of confirmation, rendered by the district court, was dismissed upon notice of the attorney-general that the appeal would not be prosecuted, and thereupon the decree became final. The decree was thus assented to by the highest legal officer of the government, specially charged with supervision over the subject. The validity of the decree, and of the grant upon which the claim of Yorba was founded, was thus forever put at rest. From that day it could never be successfully ques-

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tioned in any form of procedure, or by any tribunal known to our laws. It was a closed question for all time.

But this is not all. The defendants purchased their interests after the final decree. They are charged in the bill, it is true, generally, with notice of the alleged frauds of the claimant, but when, or where, or in what manner they had notice, is not averred. The vagueness of the allegation gives it only the weight of mere clamor. But, assuming that the defendants had sufficient notice to put them upon inquiry, they had at the same time notice of the decree, which was an adjudiciation—the highest possible evidence—that the alleged frauds had no actual existence; and that to this adjudication the government through its attorney-general, had consented. They had a right, therefore, to

rely implicitly upon the decree, and rest in confidence upon the assurance of its finality, given by the only officer of the United States who could question it. They can, therefore, justly insist upon protection in the property purchased; and no court of equity, under the circumstances, would lend its aid to the commission of so great a wrong as the destruction of their title.

Where the district attorney of this district obtains authority to institute, in the name of the United States, a suit for that purpose, we are not informed. There is no law of congress which requires it or allows it; and we have sought in vain for the power of the attorney-general to direct it. That officer can, it is true, institute or direct the institution of suits for the revocation and cancellation of patents of lands belonging to the United States, issued upon false and fraudulent representations to the executive officers of the land department, or upon their misconstruction of the law. He is the legal adviser of the heads of the executive departments, and if they are fraudulently imposed upon, or have mistaken the law, he can take the necessary legal proceedings to recall the results of their action. But that is a very different matter from instituting or directing proceedings to vacate or recall patents founded upon decrees of a commission or court exercising a special and exclusive jurisdiction over the subjects investigated, where the law declares that such decrees shall be final and conclusive between the parties, and to which decrees the attorney-general in office at the time assented. Those decrees established the obligations of the United States to the claimants under the treaty; and if the legislative department, which authorized the proceedings before the commission and court, be satisfied with the result, it is difficult to see upon what pre-

tense the attorney-general can seek to disturb it. If the attorney-general, by virtue of his office, possesses any such extraordinary power, as claimed in the case, to disregard the action of his predecessor, and to renew litigation at his pleasure respecting the titles of a whole people, upon a suggestion that false testimony may have been used in the original proceedings, the security which the holders of patents from the government issued upon such decrees have hitherto felt in their possessions is unfounded and delusive. We must have further evidence than is presented to us before we can admit the existence of a power so liable to abuse, and so dangerous to the peace of the community.

But if we admit that the attorney-general is authorized to direct the institution of a suit like the present, in the name of the United States, and that the district attorney has been thus directed, his power in this respect must be exercised in subordination to those rules of procedure and those principles of equity which govern private litigants seeking to avoid a previous judgment against them. The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.

Although, on grounds of wise public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

The bill in the present case not only does not disclose, as already shown, any extrinsic collateral acts of fraud constituting grounds for equitable relief, but alleges that the antedating of the grant and act of judicial possession, which form the gravamen of complaint, appear on the face of the original documents on file in the archives in the custody of the surveyor-general of the United States. If this be so, the law agent should have shown the fact by the production of the originals. He should have inspected original documents in all cases where copies alone were offered by the claimant, whether suspicions were excited or not as to their genuiness.

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The law of Mexico with respect to the alienation of her public lands was well known at the time. It had been the subject of reports to the government by agents employed to look into the grants of the former government, and of consideration and comment by the courts

in numerous instances. That law pointed out the proceedings required for the acquisition of titles of land from Mexico, and showed that a record of them was required to be kept. That record was in the possession of the United States, and should have been examined by the law agent of the government whenever any of its entries or documents were the foundation of a claim. He was appointed for the express purpose of looking after and protecting the interests of the United States. The allegation that the claimant was guilty of a fraudulent suppression in not producing all the documents in the archives respecting his title is puerile. He produced all that was necessary to present his claim, and if the law agent was not satisfied with them, he should have made his objection at the time. The archives were not in an "unsearchable condition," as alleged, until 1858; but even if they had been, the law agent could still have insisted upon the production of the originals for inspection.

After the archives were arranged and the alleged "unsearchable condition" eased, nearly eighteen years elapsed before the present bill was filed, and no excuse is offered for this delay. During these eighteen years, which constitute a period equivalent almost to a century in other countries, great changes in the condition and value of real property in the state have occurred. During the period, the original claimant, who might perhaps have explained the alleged alteration of dates, has deceased, and third parties have acquired his interests, and, it is said, have made valuable and expensive improvements upon the property. Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in

this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases, and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is the doctrine of equity, irrespective of any statute of limitations, and irrespective of the character of the suitor. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property.

It only remains to notice the allegations of the bill with respect to a previous grant of eleven leagues, stated to have been obtained by the claimant from the Mexican nation in 1840, and the allegation that the approved survey of the claim confirmed was not in accordance with the map accompanying the grant, and the act of juridical possession.

Whether the issue of a previous grant to the claimant for the quantity designated would have disqualified him from receiving a second grant, was a question of law, to be determined by the commissioners and district court; and any error committed in its determination could only be corrected on appeal. And the allegation of fraudulent concealment by the claimant of the existence of the prior grant is an idle one in the face of the fact that the Mexican law, of which the court is bound to take notice, required a record of every grant to be kept, and that this record, with other public property, passed to the United States on the cession of the country. If there, was any such grant as stated, so far from its existence being concealed by the claimant, the evidence of its existence was in the custody of the government, and its attention had been specially directed to the document by agents appointed to ascertain what grants had

been made by the former government, who examined the records and reported a list of all grants found among them. Allegations thus in conflict with the public records and public history of the country need not be specially controverted any more than allegations at variance with the settled law. A fraudulent concealment by the claimant of a public record, never in his possession, but always in the keeping of the government, and open at all times to the inspection of the world, was a thing impossible. The bill might, with as much propriety, have alleged that the claimant concealed from the court one of the public statutes of the country.

As to the alleged error in the survey of the claim, it need only be observed that the whole subject of surveys upon confirmed grants, except as provided by the act of 1860, which did not embrace this case, was under the control of the land department, and was not subject to the supervision of the courts. Whether the survey conforms to the claim confirmed, or varies from it is a matter with which the courts have nothing to do; that belongs to a department whose action is not the subject of review by the judiciary in any case, however erroneous. The courts can only examine into the correctness of a survey when, in a controversy between parties, it is alleged that the survey made infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights. They cannot order a new survey, or change that already made.

It follows, from the views we have expressed, that the demurrer to the bill must be sustained; and as no amendment would reach the principal objection, namely: that the alleged frauds are not such extrinsic collateral

acts as would justify the interference of equity with the decree of confirmation, the bill must be dismissed.

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The principal objection to the bill in this case applies with equal form to the bills in the Throckmorton and Carpentier Cases, and the demurrers in those cases will also be sustained, and the bills dismissed. The allegation in the Throckmorton Case, that the defendant Howard had notice of the fabrication of the papers from the claimant, given in other proceedings before the board, and other allegations imputing guilty knowledge to him and to the other defendants, are too vague and general to merit consideration, made as they are in a bill not verified, and only upon information and belief. The district attorney should at least have stated the sources of his information and the grounds of his belief, that the court might see that the former was something better than idle rumor, and the latter something more than unfounded credulity.

The defendant Howard has filed an answer denying under oath, generally and specifically, every charge against him; but by stipulation on the argument, he is to have the benefit of the decision upon the demurrer.

As the questions presented in the several cases are of vast importance to the people of this state, the district judge, whose great experience in the examination of land cases gives weight to his views, will read a concurrent opinion with special reference to the Carpentier Case.

Our judgment is that the demurrers be sustained in the three cases, and the bills be dismissed; and it is so ordered.